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061420—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 220

DAISY I. MORGAN, EXECUTRIX OF THE ESTATE OF CELESTE SMITH MURRAY, DECEASED, PETITIONER

v.

FRANK T. HINES, AS ADMINISTRATOR OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court did not deliver an opinion. The opinion of the Court of Appeals for the District of Columbia (R. 19–20) is reported in 149 F. (2d) 21.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1945 (R. 21). The petition for a writ of certiorari was filed on July 12, 1945. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

An administrative regulation regarding reinstatement of United States Government life insurance required the insured to furnish a written application signed by him, and provided as a condition to waiving this requirement after his death that there be a "satisfactory reason" for his noncompliance. This case presents the question whether in the absence of compliance with the requirement and of any reason for noncompliance other than the insured's death, the personal representative of the beneficiary was properly denied mandatory relief compelling the Administrator of Veterans Affairs to reinstate the policy.

POLICY PROVISION AND REGULATION INVOLVED

The insurance policy involved contained the following provision as to reinstatement (R. 2–3):

> This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with

policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy.

The pertinent regulations of the Veterans Administration as to reinstatement provide:

3079. United States Government life insurance may be reinstated:

(A) Within three calendar months including the calendar month for which the unpaid premium was due, provided the applicant is in as good health as he was at the due date of the premium in default. (38 C. F. R. 10.3079.)

* * * * *

3080. The applicant for reinstatement of United States Government life insurance must furnish during his lifetime, and before becoming totally and permanently disabled, a written application signed by him which shall state that he is in as good health as at date of lapse, or that he is in good health, in accordance with the requirements of the particular case; and in addition the applicant shall furnish such evidence relative to his physical condition as may be required by the director on such forms as the director may prescribe: *Provided,* That if the insurance becomes a claim after tender

of the amount of the premiums required but before full compliance with the requirements of this paragraph, and the applicant was in the required state of health at the date that he made the tender of the amount of premiums, and that there is a satisfactory reason for his noncompliance, the director may, if the applicant be dead, waive any or all of the requirements of this paragraph, or, if the applicant be living, allow compliance with this paragraph, as of the date the required amount of premiums was received in the bureau. (38 C. F. R. 10.3080.)

STATEMENT

This suit was brought on August 4, 1943, by the petitioner Daisy I. Morgan as "Executrix" of the estate of Celeste Smith Murray, the deceased beneficiary of a lapsed $10,000 United States Government life insurance policy, to compel the respondent, the Administrator of Veterans Affairs to reinstate the policy as of a date prior to the death of the insured (R. 1–6).

The petitioner's complaint alleged in effect that the policy lapsed for nonpayment of the monthly premium due on January 12, 1934, and that the insured died on March 5, 1934; that the beneficiary, who had previously paid all the premiums on the policy, "paid" as premiums on two occasions within a week prior to the insured's death sums of money the total amount of which was

more than sufficient to reinstate the policy, the last payment being made on the day before his death; and that when each of these payments was made the insured was in good health and an insurable risk (R. 2–4).

The complaint further alleged that the respondent arbitrarily refused to reinstate the policy because of the physical and mental condition of the insured when the two payments were made, despite the fact that all of the evidence in the insured's file—it was alleged on information and belief—showed that the insured was in good health on those occasions (R. 4–5).

The respondent filed an answer (R. 7–15) denying the allegations in the complaint as to the insured's health, what the evidence in the file showed concerning it, and the allegations that the respondent's refusal to reinstate was arbitrary (Paragraphs III, V, and VIII; R. 10, 11). The answer alleged in effect that the insured failed to comply with the requirement in Regulation 3080 *supra,* pp. 3–4, that he furnish an application signed by him containing a statement that he was in the required state of health; that the beneficiary had sought a waiver of the requirement under the proviso for waiver in the Regulation and that respondent had refused to waive the requirement and reinstate the policy because he found upon all of the evidence in the record that insured was not in the required state of health (Paragraph IX; R. 13, 14).

The answer denied the allegations in the complaint as to the respective dates of the two payments made by the beneficiary and of the insured's death, alleging that the insured died on March 4, and not on March 5 (as alleged in the complaint); that the check for the first payment was "tendered" by the beneficiary on the day before the insured's death, and the second check not until the day after death (Par. II; R. 9–10, Par. VII; R. 11, Par. IX; R. 12–13).[1] It was further alleged that an offer had been made to the beneficiary to refund the money upon a proper showing as to who was entitled to it, but that there had been no response to the offer (Pars. II & IX; R. 10, 13).

Thereafter the action was dismissed on motion filed by respondent for failure of the complaint to state a cause of action (R. 16). On appeal by petitioner (R. 17), the Court of Appeals for the

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[1] According to these allegations in the answer there was a failure to comply with the condition in the waiver proviso in Regulation 3080 that a "tender of the amount of the premiums required" be made before "the insurance becomes a claim," *i. e.*, before the insured's death. The policy required payment of "all premiums in arrears" when the insured died. These included not only the one due on January 12 (the date of the lapse), but also the one due February 12, despite the fact that the grace period for its payment had not expired. *United States* v. *Huie*, 73 F. (2d) 305, 306 (C. C. A. 5); *United States* v. *Norton*, 77 F. (2d) 731 (C. C. A. 5). The amount ($7.00) of the only payment made before death according to these allegations was only sufficient to pay one monthly premium.

District of Columbia affirmed, holding that the complaint failed to show any duty or, indeed, any power in the respondent to waive the requirement for reinstatement in Regulation 3080[2] (*supra*, pp. 3–4), which admittedly had not been complied with, as to furnishing a written application signed by the insured containing a statement that he was in the required state of health. The court interpreted the proviso in the regulation for waiver of the requirements of the regulation after an insured's death, as not permitting such a waiver in the absence of a "satisfactory reason" (Regulation 3080) for the insured's noncompliance with the requirements, and held that no such reason appeared from the complaint.

ARGUMENT

The decisions of the courts below are in accord with the rule established by numerous decisions of this Court, the Court of Appeals for the District of Columbia, and other federal appellate courts, that an action, as here, in the nature of mandamus does not lie against an executive officer

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[2] This regulation was authorized by Section 5 of the Act of June 7, 1924, 43 Stat. 607, 608, 38 U. S. C. 426, which provides in part:

"The director [Administrator of Veterans Affairs], subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, * * *."

unless the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory. *United States* v. *Wilbur*, 283 U. S. 414, 420; *United States ex rel Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *United States* v. *Coe*, 95 F. (2d) 347, 348 (App. D. C.); *Hammond* v. *Hull*, 131 F. (2d) 23, 25 (App. D. C.); *Huddleston* v. *Dwyer*, 145 F. (2d) 311, 315 (C. C. A. 10); *Frankel* v. *Woodrough*, 7 F. (2d) 796, 797 (C. C. A. 8). Regulation 3080, *supra*, pp. 3–4, contains a proviso that the director [Administrator of Veterans Affairs] "*may* * * * waive" certain reinstatement requirements if three conditions are met, *viz.*, (1) tender of premiums in arrears, (2) good health of the insured at the time of tender, and (3) "satisfactory reason" for not filing a written application, etc., concerning his health. Because of its terminology, this proviso lodges a large degree of discretion in the Administrator (cf. Pet. 15–16), thereby rendering untenable an action in the nature of mandamus. In any event, petitioner did not meet the third "satisfactory reason" condition.

In the complaint there was no allegation of compliance with the requirement in Regulation 3080, *supra*, pp. 3–4, that the insured furnish a written application for reinstatement signed by him. Petitioner apparently concedes, as in the court below, that there was no such compliance. Consequently, under the proviso clause of the regulation, a "satisfactory reason" for noncompli-

ance with the requirement is called for. Death is the only reason appearing in the complaint, but, as the court below observed (R. 20), death would not constitute a "satisfactory reason" for noncompliance. The proviso "and that there is a satisfactory reason for his noncompliance" applies only where the insured has died and would be surplusage if death alone were a sufficient reason. The phrase was obviously inserted to protect the Government from fraudulent claims, such as where the insured has not consented to reinstatement.

Petitioner asserts, without attempting to support the assertion, that the "satisfactory reason" part of Regulation 3080 "has never been enforced by the Veterans Administration" (Pet. 13). On the contrary, the Veterans Administration has consistently insisted that a "satisfactory reason" be shown for noncompliance. Petitioner's case is not supported by the fact that respondent in his answer [3] defended on the ground that the insured was not in the required state of health and did not allege the absence of a "satisfactory reason" for the insured's failure to furnish a statement signed by him that he was in the required state of health (see Pet. 13). Such an omission from the

[3] In the answer, the respondent stated that the tender of premiums in arrears was not acceptable since unaccompanied by the insured's written application concerning health and that the "other requirements of said Regulation [3080] should not be waived" (R. 13, 14).

answer may not be regarded as favorable to petitioner, since the matter to which it relates was an essential part of her own case.

The deficiency in the complaint of a lack of any allegation of the "satisfactory reason" prerequisite to waiver in question was manifestly not supplied by the allegation of another prerequisite (*i. e.*, that the insured "was in the required state of health at the date that he made the tender of the amount of the premiums"), or by the allegation that respondent's refusal to reinstate was based on an erroneous and arbitrary finding as to the insured's health. None of the decisions regarding mandatory relief, relied on by petitioner (Pet. 8, 9, 16–18) is in conflict with this view.

CONCLUSION

The decision of the court below is correct and presents no conflict. We therefore respectfully submit that the petition should be denied.

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